

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SENISI, et al., : 13-CV-3314 (LTS)  
Plaintiffs, : September 5, 2013  
v. : 500 Pearl Street  
JOHN WILEY & SONS, INC., : New York, New York  
Defendant. :

TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY CONFERENCE  
BEFORE THE HONORABLE LAURA TAYLOR SWAIN  
UNITED STATES CHIEF DISTRICT JUDGE

## APPEARANCES:

For the Plaintiff:

KEVIN McCULLOCH, ESQ.  
DANIEL NELSON, ESQ.  
Nelson & McCulloch LLP  
405 Lexington Avenue  
New York, New York 10174

For the Defendants:

JESSIE BEEBER, ESQ.  
ANNA KADYSHEVICH, ESQ.  
Frankfurt Kurnit Klein & Selz, PC  
488 Madison Avenue  
New York, New York 10022

Court Transcriber:

SHARI RIEMER  
TypeWrite Word Processing Service  
211 N. Milton Road  
Saratoga Springs, NY 12866

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1                   THE COURT: This is the initial pretrial conference  
2 in the matter of Senisi v. John Wiley & Sons, Number 13-CV-  
3 3314.

4                   I'm Judge Swain. For the benefit of the digital  
5 audio record, counsel would you please introduce yourselves by  
6 way of stating your appearances.

7                   MR. McCULLOCH: Good afternoon, Your Honor. Kevin  
8 McCulloch from Nelson & McCulloch for plaintiffs.

9                   THE COURT: Good afternoon, Mr. McCulloch.

10                  MR. NELSON: And Dan Nelson from Nelson & McCulloch  
11 also for plaintiffs.

12                  THE COURT: Good afternoon, Mr. Nelson.

13                  MR. NELSON: Good afternoon.

14                  MS. BEEBER: Jessie Beeber, Frankfurt Kurnit for  
15 defendant Wiley.

16                  THE COURT: Good afternoon, Ms. Beeber.

17                  MS. KADYSHEVICH: Anna Kadyshevich, Frankfurt Kurnit  
18 for defendant Wiley as well.

19                  THE COURT: Good afternoon, Ms. Kadyshevich. Good to  
20 meet you.

21                  The principle matter I think on which we need to  
22 focus today is the premotion conference with respect to the  
23 defendant's request to stay discovery pending resolution of  
24 the motion to dismiss, and I note that earlier this afternoon  
25 I signed the stipulation extending slightly the briefing

1 schedule on that motion. So that should appear on the ECF  
2 system within a day or so, if not by this afternoon.

3                   What discovery requests are pending or outstanding  
4 at this point, if any?

5                   MR. McCULLOCH: Your Honor, Kevin McCulloch for  
6 plaintiffs. We actually received the request to stay when we  
7 began the meet and confer process under Rule 26. So no  
8 discovery has been served because the defendant wouldn't meet  
9 and confer and before we, plaintiffs, could request Your Honor  
10 compel that discovery would proceed and enter a discovery  
11 schedule the plaintiff -- the defendant requested a premotion  
12 conference on the stay and Your Honor granted the request to  
13 hear that issue today. So over the last couple of weeks  
14 nothing has transpired. There is no outstanding discovery  
15 that's been served yet.

16                   THE COURT: And in terms of your near term  
17 anticipated waves of discovery, can you give me a general  
18 sense of the nature and scope of the request that you  
19 anticipate?

20                   MR. McCULLOCH: Yes, Your Honor. Just given the  
21 nature of the claims I think it would make sense to focus on  
22 the narrow licensing history of the plaintiff's images John  
23 Wiley's uses thereof. This is pretty elementary discovery  
24 that -- there's really no question about whether or not it  
25 would be within the scope of Rule 26. We would request copies

1 of the actual licenses and the usages of the photos identified  
2 in those licenses and then revenue data, et cetera, the basic  
3 elements of a claim for copyright infringement. We would  
4 focus on the copyright claims specifically. I think that  
5 there's no doubt that those claims will proceed. There might  
6 be some question about the DEC action claims and given the  
7 nature of those legal questions we can focus on the copyright  
8 claims in discovery.

9 I'd note that this Court has in my knowledge never  
10 stayed discovery in these types of claims against John Wiley.  
11 I cited seven different instances in which Wiley has sought a  
12 stay of discovery. Three times Judge Dolinger all in related  
13 cases he denied them at an initial pretrial conference. They  
14 reiterated and renewed their motion for a stay to Judge  
15 Dolinger in those three cases, denied again. Even in cases  
16 where claims, copyright claims eventually have been dismissed  
17 Judge Freeman denied a stay of discovery. In fact, the  
18 ultimate dismissal of the copyright claims was based on  
19 affidavits that pertain to elements that were uncovered in  
20 discovery. I'm not aware of any copyright claims in this  
21 district against textbook publishers where there has been a  
22 stay of discovery ordered. Pearson has sought similar stays  
23 also from Judge -- in cases before Judge Etkin, in cases  
24 before Judge Holwell and in cases in front of Judge Rakoff all  
25 of them have been denied.

1           The elements of our pleadings are identical to the  
2 claims in front of Judge Etkin that Judge Etkin repeatedly has  
3 found can proceed. Judge Etkin has contrary to the  
4 representations of Wiley's motion denied -- dismissed any of  
5 the copyright claims in the Young Wolf or the Rubin or the  
6 Warren case. He also didn't dismiss any of the claims in the  
7 Schneider or the Soyhoyos case. All of those cases have  
8 identical allegations against the same defendant for the exact  
9 same conduct, pled in the same manner where we identified the  
10 license violations in the complaint and attach exhibits of the  
11 photos and the books at issue to whatever extent we can obtain  
12 the information prior to discovery and the claims are made  
13 based upon that information. And all of them have proceeded  
14 to discovery. None have been dismissed except where there is  
15 an arbitration clause and Wiley doesn't make that argument  
16 here. That's the Kohl case. That argument has not been made  
17 here and so the Kohl ruling by Judge Freeman is in a posit.

18           But I'd also note that even where Judge Kohl  
19 ultimate -- or Judge Freeman ultimately dismissed the claims  
20 in the Kohl v. Wiley case, she didn't stay discovery and  
21 discovery proceeded in that case as well.

22           So in our opinion focusing on the copyright claims  
23 would be I think an appropriate way to narrow the scope of  
24 discovery at this point to avoid any potential prejudice. We  
25 would focus on the licensing history of plaintiff's works by

1 Wiley, the usages of those photos and the elements of damages  
2 related thereto, profits attributable to loss, license fees,  
3 et cetera. Those are basic elements of the copyright claim.

4 There would be broader discovery necessitated later  
5 on policies and procedures, et cetera, that Wiley has been  
6 ordered to produce in every case but at this point I think the  
7 basic elements of discovery should at least proceed if not all  
8 of it, Your Honor.

9 THE COURT: Thank you. Ms. Beeber.

10 MS. BEEBER: Your Honor, I'd like to back up sort of  
11 to the beginning for a moment here and talk about the claims  
12 that the seven plaintiffs are bringing in this case. The  
13 seven plaintiffs are all photographers, all represented by the  
14 same attorneys who have represented those same photographers  
15 in other photographers in cases against Wiley and other  
16 textbook publishers as well. This case, however, is very  
17 different from the other kinds of cases that these plaintiff's  
18 counsel have brought in the past and it's different for a  
19 couple of reasons.

20 The first is that they make a copyright infringement  
21 claim sort of on behalf of all seven photographers alleging  
22 vaguely that all of the photographers took photographs were  
23 licensed to Wiley either through unidentified photo agencies  
24 or them themselves and were infringed in a one paragraph sort  
25 of laundry list of acts. These seven photographers did not

1 take any photographs together. They each took their own  
2 separate photographs at different times, used different  
3 licensing agencies at different times, have completely  
4 different facts regarding what Mr. McCulloch calls the simple  
5 elements of the copyright infringement claim.

6 THE COURT: Well, let's say I were to find merit in  
7 your misjoinder argument.

8 MS. BEEBER: Yes.

9 THE COURT: Let's just say that still wouldn't  
10 visciate the individual's copyright claims, it wouldn't in and  
11 of itself visciate the individual's copyright claims and so to  
12 the extent I exploded the case and made them pay six more  
13 filing fees you're still going to get the same question.

14 MS. BEEBER: I agree with that, Your Honor. I'm  
15 actually making a little bit of a different point which is --

16 THE COURT: I'm sorry.

17 MS. BEEBER: -- in the other cases that Mr.  
18 McCulloch mentioned while they may have attached an exhibit  
19 like they did in this case they attached Exhibit 7 through 11  
20 to the complaint which are each just a chart of every time  
21 they say a photo was licensed to Wiley by a particular  
22 photographer. In the other cases that Mr. McCulloch was  
23 talking about, for instance in the Warren case there was one  
24 photograph that was identified as being infringed and that  
25 photograph was pled in the complaint. In the Rubin case there

1 was one photograph that they allege was infringed. That was  
2 pled in the complaint. In the Young Wolf case there were 17  
3 photographs pled in the complaint and then the long laundry  
4 list exhibit that was attached.

5                   What Judge Etkin said is that the copyright  
6 infringement claim proceeds with respect to the 17 that are  
7 identified in the complaint but you can't just attach an  
8 exhibit with a lot of images and a lot of dates and say that  
9 that's your copyright infringement claim. So, here, although  
10 Mr. McCulloch is saying it would be a very simple matter of us  
11 producing the licenses and the uses of the images, the huge  
12 question, the question to be decided on our motion to dismiss  
13 is what images are you talking about. There is no particular  
14 image pled in the complaint with respect to any particular  
15 plaintiff and that is why going forward with discovery right  
16 now -- you know, we meet all of the standards for a stay.

17                   The breadth of discovery is incredibly wide because  
18 they have 222 images listed in the exhibits of their  
19 complaint. They're not even saying that all of those were  
20 infringed but they're saying this is it, now you produce all  
21 the licenses and all the usage information with respect to  
22 those images. I would submit they at least have to have an  
23 allegation in the complaint saying yes, this image was  
24 infringed.

25                   As far as prejudice, the prejudice to us is great

1 because we have to open our record room and produce all this  
2 information before it's even decided what copyright claims are  
3 in the case.

4                   Now, another thing that distinguishes this case from  
5 every one that they brought in the past except for one is that  
6 they're asking for a declaratory judgment that they are  
7 entitled to some audit and accounting through Wiley's books  
8 and records. Now, first of all, that's a completely  
9 unprecedeted claim. Judge Daniels just dismissed that exact  
10 same claim brought by the exact same lawyers, the exact same  
11 plaintiff Senisi against Hobb Mifflin and he said there's no  
12 right under the copyright act to an audit and therefore you do  
13 not have a basis for bringing a declaratory judgment action  
14 seeking an audit.

15                   Now, if we were to give them discovery on that issue  
16 they would be getting the ultimate relief that they are  
17 seeking in this case with respect to their declaration before  
18 our motion to dismiss has even been reviewed and decided.  
19 That is highly prejudicial.

20                   THE COURT: Well, they say they're not asking for  
21 discovery relevant to the declaratory judgment claim, at least  
22 on the front end of this case.

23                   MS. BEEBER: If we went forward there would have to  
24 be some very clear stipulation to that effect and I think the  
25 problem with them saying that is that those source of claims

1 are completely intertwined with the amorphous copyright claims  
2 that they're making because they haven't identified in the  
3 complaint what images they are saying are infringed. If they  
4 have these long lists of everything that they say was ever  
5 licensed to Wiley and we then have to produce them information  
6 on those regardless of whether they're saying those images  
7 were infringed or not, that is the same relief that they're  
8 seeking in the DEC action. It's the exact same thing. It's  
9 saying account to us on all of these images regardless of  
10 whether we say they were infringed or not.

11           Getting to the strength of our motion, I think I  
12 have addressed that to some extent already. Obviously to  
13 plead a copyright claim you cannot just attach exhibits full  
14 of lists of images. You have to say what image was infringed,  
15 when it was infringed, how it was infringed, et cetera, and  
16 you have to do that for each plaintiff and for each image.  
17 You can't mush all of the plaintiffs together.

18           And another thing that we pointed out in our motion  
19 to dismiss is that two of these plaintiffs, Hankin and Newman,  
20 do not have any copyright claims at all. No copyright  
21 infringement claims pled whatsoever and plaintiff's counsel  
22 has confirmed that to us. So with respect to them if there's  
23 no discovery happening on the declaratory judgment action  
24 certainly there should be no discovery whatsoever with respect  
25 to them.

1           Again, I have to come back to them saying very  
2 easily we won't seek discovery on the declaratory judgment  
3 action because I think it's all just the same thing.

4           THE COURT: You're saying to the extent they're  
5 seeking revenue and usage information with respect to -- and  
6 the licensing history that is in effect a generalized audit at  
7 least to the extent that they haven't made specific claims of  
8 infringement?

9           MS. BEEBER: That is absolutely right, Your Honor.  
10          That's what I'm saying. So I understand there's no automatic  
11 stay just because you file a motion to dismiss. What I'm  
12 saying is that this is an unusual case. Because of the way  
13 that they pled their claims I think going forward with the  
14 discovery right now basically gives them the ultimate relief  
15 they're seeking in the case and puts us to an incredible  
16 burden of producing documentation on images that they're not  
17 even saying were infringed. That's why we should be entitled  
18 to a stay.

19           THE COURT: Thank you. Mr. McCulloch.

20          MR. McCULLOCH: Your Honor, I'd actually like to  
21 address these issues in reverse order from Ms. Beeber's  
22 presentation. So I'll address the contention that the relief  
23 that we're seeking the DEC action is the same discovery we  
24 would be seeking under -- with respect to the copyright claims  
25 and that's just patently false.

1                   The DEC action is a -- seeks relief that we are  
2 entitled to the information without having to file a copyright  
3 claim and wait until discovery to get the information.  
4 Getting it under Rule 26 doesn't in any way moot the question,  
5 the legal question about whether or not we're entitled to it  
6 presuit, number one.

7                   Number two, and much more importantly, the DEC  
8 action pertains to the claim -- to the photos not capable of  
9 being identified. Meaning the discovery we would seek pertain  
10 to the photos identified in the charts we are able to identify  
11 that have been used by Wiley. The DEC action seeks the  
12 information for the broader universe of plaintiff's photos  
13 that Wiley has used without any licensing information being  
14 provided to the plaintiffs. So Ms. Beeber is just wrong. The  
15 DEC action is much broader than the licensing history of the  
16 photos identified in the exhibits. They are different issues.  
17 They're pertaining to a broader set of photos and it would be  
18 a presuit relief, not Rule 26.

19                   On this point I'd like to note Judge Daniels  
20 dismissed plaintiff's DEC action claim because he ruled that  
21 we would be entitled to it in discovery anyhow. That is --  
22 that's sort of misnomer that Wiley is skipping over here.  
23 Judge Daniels said you're going to get this anyhow, I'm  
24 dismissing the DEC action even though -- because there's no  
25 third -- you're not a third party beneficiary of the licenses.

1 Plaintiff's in this case, however, have direct licenses to  
2 Wiley. So Judge Daniels' ruling is in a closet. But even if  
3 it applied his ruling was you're going to get licensing  
4 history in discovery anyhow, I'm dismissing the DEC action, go  
5 ahead and seek this information and he didn't stay discovery  
6 while that motion was pending. He didn't stay discovery  
7 during argument on the motion. Discovery proceeded and Judge  
8 Daniels didn't stay discovery even though there are identical  
9 claims in that case as there are in this case.

10 With respect to the question about whether or not  
11 plaintiffs identified the photos and alleged copyright  
12 infringement for the photos, Ms. Beeber is just patently  
13 misconstruing the rulings of this court and mischaracterizing  
14 the pleadings.

15 Let me focus on an example. David Young [Ph.] v.  
16 Wiley. There are two exhibits to that complaint. One is 17  
17 photos in 50 or so books that are copyright claims. Then  
18 there's Exhibit 2 which are a much broader set of photos that  
19 are contract claims. Judge Etkin dismissed the contract  
20 claims, let the copyright claims proceed. Both are in  
21 exhibits. There's no part of Judge Etkin's ruling that says  
22 I'm dismissing it because it's in a chart that's attached to  
23 the complaint as opposed to the body of the pleadings. That  
24 distinction is irrelevant.

25 THE COURT: Will you as plainly and directly as you

1 can respond to Ms. Beeber's assertions as I understand it that  
2 to the extent copyright claims have been held properly pleaded  
3 in these cases the plaintiff has identified particular images  
4 and particularized his or her contention that the  
5 particular -- the copyright in the particular image has been  
6 infringed?

7 MR. McCULLOCH: Yes. Judge Etkin has ruled on this  
8 issue in Schneider v. Pearson, Rubin v. Wiley, Warren v. Riley  
9 and David Young v. Wiley, four decisions in the last eight  
10 months by Judge Etkin. He's reached the same conclusion in  
11 every case. He says a single paragraph outlining the types of  
12 infringements is sufficient to put Wiley on notice of the  
13 types of infringement claims against it and it out of an  
14 abundance of caution -- this is quoting Judge Etkin "Wiley can  
15 presume that all sorts of infringement are being contended,"  
16 and that's what we do here.

17 THE COURT: So are you saying that you are making a  
18 contention in this complaint that every single image listed in  
19 your exhibits has been infringed in one or more of the ways in  
20 your omnibus paragraph?

21 MR. McCULLOCH: Yes. Exhibit 7 through 10 include  
22 lists of the photos and the books and licensing parameters  
23 where they're available and our contention is in one of the  
24 various ways that we've identified in the complaint Wiley has  
25 infringed copyrights in each and every one of those photos. I

1 can direct Your Honor to Paragraphs 108 through 115.

2 THE COURT: I'm looking at 109. It says plaintiffs  
3 assert copyright infringement claims related to the photos  
4 identified in 7 through 10. It doesn't say each and every and  
5 so --

6 MR. McCULLOCH: The reason that we put that paragraph  
7 in is because Wiley made the same argument in the Young Wu  
8 case and says there's a whole host of photos in this big chart  
9 and we don't know what infringement claims apply to what.

10 THE COURT: So you're stating on the record here as  
11 an officer of the court that the intent of this paragraph is  
12 to indicate that there is a copyright infringement claim  
13 asserted with respect to each and every photo as opposed to  
14 relating somehow to something in the list?

15 MR. McCULLOCH: Yes. Yes, Your Honor. The reason  
16 that is the case, just so that we're clear, as this court has  
17 held on at least a half a dozen occasions and as almost every  
18 court that I'm aware of in the country has held, the defendant  
19 Wiley has sole possession of the information to make our more  
20 specific allegations. Those are license. The license  
21 includes a whole host of parameters. A print one, a language  
22 restriction, a territory restriction, a usage restriction and  
23 what book it can go in. Wiley knows the print run. Wiley  
24 knows if it produced -- if it granted foreign licenses. Wiley  
25 knows if it reused the photo in a different book without

1 permission but Wiley won't share that information. But we do  
2 know that Wiley has been held liable multiple times involving  
3 these same types of cases and the evidence in those cases  
4 suggest that Wiley had corporate policies that it capped --  
5 for instance, capped print run numbers at 100,000 even though  
6 it knew it was printing millions of copies of certain books.

7 Because the information is in Wiley's sole  
8 possession we assert copyright claims under rule 11 upon  
9 information and belief. The evidence from other cases  
10 provides more than sufficient information and belief for us to  
11 assert those claims and then discovery proceeds and then we  
12 amend the complaint to narrow the scope so that we identify  
13 which specific claims go with which specific photos. This is  
14 the whole exercise of why Rule 11 exists. We briefed this  
15 issue to this court almost a dozen times now in Wu v. Pearson  
16 I, Wu v. Pearson II, Schneider v. Pearson, Rubin v. Wiley,  
17 Warren v. Wiley, David Young v. Wiley, Soyhoyos v. Wiley. All  
18 of those claims have been asserted and pled in the identical  
19 fashion as we do here. All of those claims have proceeded.  
20 The only times that claims have been dismissed are Cole v.  
21 Wiley where there is an arbitration clause and discovery  
22 wasn't stayed in that case and there were subsequent  
23 additional amended complaint in Cole v. Wiley. Discovery was  
24 allowed on that and Wiley submitted affidavits to the court  
25 that it didn't publish those photos, that we had misidentified

1 them and Judge Freeman dismissed the claims after discovery  
2 based upon that representations from Wiley.

3 THE COURT: Thank you.

4 MR. McCULLOCH: I think that gives us the weight of  
5 why the defendant's motion is weak.

6 Then the final -- I'm sorry.

7 THE COURT: Do you have a final point?

8 MR. McCULLOCH: Yes. Just Ms. Beeber said on the  
9 joinder issue whether or not the case should be settled, that  
10 these photographers never took photos together, didn't work  
11 together, aren't in the same agencies and are in different  
12 books and just none of that's true. Ms. Dwight and Ms. Senisi  
13 worked together on a regular basis. Their images appear in  
14 all of the same books. That's because there's not a lot of  
15 people taking pictures of this type of content.

16 THE COURT: As I indicated in one of my first  
17 comments to Ms. Beeber the question of whether these people  
18 are ultimately all properly joined together in this particular  
19 case is not for me a significant factor in the issue of  
20 whether discovery should go forward at this point. Obviously  
21 it's a core issue raised in the motion to dismiss but there's  
22 no need to argue that issue right now.

23 MR. McCULLOCH: I guess I was just giving you a  
24 teaser. Thanks, Your Honor.

25 THE COURT: Thank you. Briefly, Ms. Beeber.

1                   MS. BEEBER: Yes, Your Honor. I'd like to address a  
2 couple of points. I think that what Mr. McCulloch has said  
3 here today that every single image listed in the exhibits is  
4 claimed to have been infringed underscores why we need a stay  
5 of discovery. The reason for that is this. Plaintiffs and  
6 defendants have a basic dispute about what you need to plead  
7 in order to have a copyright claim that can go forward. As we  
8 put in our brief you have to plead which specific original  
9 works are the subject of the copyright claim that plaintiff,  
10 each plaintiff -- there are seven in this case -- owns the  
11 copyrights in those works, that the copyrights have been  
12 registered in accordance with the statute, and number four, by  
13 what act and during what time the defendant infringed the  
14 copyright.

15                   Now, he can say I attached an exhibit with 222  
16 images on it with different information for each one and now  
17 discovery should go forward. What I say is they have to be  
18 put to this pleading test first. They have to say what images  
19 were infringed and how and when and that they have copyrights  
20 in each of them and that the copyrights had been registered,  
21 and until that has happened it's prejudicial and burdensome  
22 for Wiley to have to go forward with discovery on 222  
23 different images.

24                   So I don't think that what he has said proves that  
25 the stay should be denied. I think that it proves that the

1 stay should be granted.

2 Now, I have a lot of things to address with respect  
3 to what Mr. McCulloch said and I think the first thing that I  
4 want the court to understand is I do not misrepresent. I do  
5 not obscure. I've never been in a situation with attorneys  
6 who have accused me so often of making misstatements and lying  
7 and I am not lying about what Mr. -- what Judge Daniels did  
8 when he dismissed the declaratory judgment action in Senisi.  
9 Judge Daniels did not say that they were entitled then to  
10 discovery until all of the various claims --

11 THE COURT: I recognize that I will have to read  
12 these other decisions for myself and develop my own  
13 understanding --

14 MS. BEEBER: Yes, Your Honor.

15 THE COURT: -- of them as I get into the merits of  
16 the motion to dismiss.

17 MS. BEEBER: I agree, Your Honor.

18 THE COURT: And I also recognize that each side has  
19 different understandings and positions as to the significance  
20 of those other decisions.

21 MS. BEEBER: Yes. That was the other point I was  
22 going to make which is just the court should look for itself  
23 to what those decisions say in Warren and Wiley and Rubin and  
24 Soyhoyos. There's only one plaintiff in each of those cases,  
25 not seven different plaintiffs joined together and I think

1 read through that lens the court would understand that those  
2 cases very clearly said you have to identify the works that is  
3 being infringed and how and when and in what manner.

4 The Cole case was not just dismissed because of the  
5 arbitration clause. If you read Judge Freeman's decision --

6 THE COURT: I'll read -- I will look forward to  
7 reading those and reading the briefing on those issues.

8 MS. BEEBER: Thank you, Your Honor.

9 THE COURT: I thank both counsel for your candor and  
10 for the depth of the analysis and arguments that you've  
11 offered on this question of the discovery stay.

12 The oral application for a stay of discovery pending  
13 resolution of the motion to dismiss is denied without  
14 prejudice to objections to particular requests but I will tell  
15 you right now that an objection that reiterates the arguments  
16 that have been made here about the impropriety of a request  
17 for licensing information with respect to each of the  
18 identified licenses will not be successful. So the decision  
19 to let discovery proceed in the initial stages is a decision  
20 that in gross confirms the court's view the propriety of the  
21 type and scope of discovery that Mr. McCulloch described when  
22 I asked him what his front end discovery would be.

23 So with that, I am going to depend on the parties to  
24 be clear and reasonable and cooperative with each other in  
25 proceeding with the early phase discovery pending an adjourned

1 pretrial conference to make in good faith the consultations  
2 with each other including discussions of settlement as  
3 contemplated and directed by my initial conference order and  
4 in aid of the preparation of the joint preliminary pretrial  
5 statement that is required by that initial conference order,  
6 and I'm going to put this conference out to early December so  
7 that that will permit some time for you all to focus on the  
8 conclusion of the briefing on the motion to dismiss to have  
9 discussions with each other both on the specific issues  
10 identified in the initial conference order and other issues  
11 related to discovery and I hope to be potential for settlement  
12 here and then we'll come back and set a discovery schedule and  
13 I may or may not have resolved the motion to dismiss by the  
14 early December date.

15 Ms. Ing, may I have an early December initial  
16 pretrial conference date?

17 [Pause in proceedings.]

18 THE COURT: Is everybody available as far as you know  
19 on December 6<sup>th</sup> at 10:30 in the morning?

20 MR. McCULLOCH: Yes, Your Honor, plaintiffs are  
21 available.

22 THE COURT: Thank you. I pressed some button on my  
23 computer that made it to a weird thing. So give me just a  
24 moment.

25 [Pause in proceedings.]

1                   THE COURT: Thanks for your patience. Ms. Beeber.

2                   MS. BEEBER: Your Honor, I would like to ask two  
3 things. The first is that we have an opportunity to formally  
4 brief the motion for stay of discovery and ask Your Honor to  
5 consider those papers. It was based just on the two letters  
6 that were submitted and the few minutes that we had to talk  
7 today and I think given the issues that Mr. McCulloch has  
8 raised about what they're actually claiming and what they're  
9 actually looking for we would like an opportunity to submit a  
10 motion to stay.

11                  THE COURT: I will not preclude you from doing that.  
12 I leave it to your own judgment as to whether it's an  
13 appropriate use of yours and your client's time and resources.

14                  MS. BEEBER: Thank you. In the meantime, I would  
15 like to have it clear what discovery it is that is to proceed  
16 in the meantime. Mr. McCulloch said some things today about  
17 what he's seeking and what he isn't seeking and Your Honor  
18 seemed to say that yes, what he was seeking is appropriate for  
19 now but in that statement it suggests that other things are  
20 not appropriate right now. The broader discovery on the  
21 declaratory judgment action for instance. So I would just  
22 like Mr. McCulloch to say or for us to have a clear  
23 understanding before we're off the record today of what  
24 discovery can go forward in the meantime and what cannot.

25                  THE COURT: Mr. McCulloch described what I understood

1 to be paper discovery concerning the documentation and usage  
2 history of the licenses and the works that are described in  
3 the attachments to the complaint and he undertook not to do  
4 discovery in aid of the contractual right declaratory judgment  
5 claim. So I would anticipate that it would be paper discovery  
6 consistent with those representations and not deposition  
7 discovery and [inaudible] return. Mr. McCulloch, is that an  
8 appropriate understanding of your undertaking?

9 MR. McCULLOCH: Yes, Your Honor. I think that we  
10 would obviously serve some interrogatories just to clarify  
11 what databases, et cetera would be searched and such but I  
12 think they would just be our general 33(a) initial  
13 interrogatories, not contention interrogatories which  
14 obviously will be later. We can agree not to proceed with the  
15 depositions at this time and just focus on the paper discovery  
16 and as I explained at the outset our primary concern at this  
17 point would be to get the licensing history of the -- for the  
18 books and photos identified in the exhibits and then the usage  
19 history for all of those photos. As we allege in the  
20 complaint Wiley would get a license for Book A and then  
21 reprint the pictures in Book B, C and D. So getting usage  
22 history for the photos is an essential element and then the  
23 damages discovery would be gross revenue, lost license fees,  
24 et cetera as set forth in Section 504 of the Copyright Act.  
25 That would be again limited to whatever books Wiley published

1 the plaintiff's photos in. We would get the licensing history  
2 necessary to make out lost license fees related to those books  
3 and then the revenue data for those books as well.

4 I think those are the general three or four or five  
5 categories of discovery that we would focus on, Your Honor.

6 THE COURT: As to the two plaintiffs who Ms. Beeber  
7 said are not asserting copyright claims here, will you refrain  
8 from making an inquiry as to those two plaintiffs?

9 MR. McCULLOCH: Yes, Your Honor. Just for the  
10 benefit of the court, our intention is to include copyright  
11 claims for those plaintiffs in the future but they don't have  
12 the necessary information in front of them to proceed. So  
13 that's why they are proceeding only in the DEC action. We're  
14 trying various ways to get the information either from their  
15 agents, through audits of their agents or what have you but at  
16 this point we agree since there are no copyright claims for  
17 those particular plaintiffs we wouldn't proceed with discovery  
18 for those particular plaintiffs because they don't have any  
19 copyright claims.

20 THE COURT: Thank you.

21 MR. McCULLOCH: Yes, Your Honor.

22 MS. BEEBER: Your Honor, once again I just want to  
23 say that the burden on Wiley of complying with the request  
24 that Mr. McCulloch has just outlined on the record is  
25 considerable and I do not believe that attaching an exhibit to

1 a complaint that just lists all the images that you know were  
2 licensed --

3 THE COURT: I heard you on that the first time and  
4 I've made my decision.

5 MS. BEEBER: Thank you, Your Honor.

6 THE COURT: Thank you. So I will look forward to  
7 seeing you all on December 6<sup>th</sup> and to receiving the motion  
8 papers. We're adjourned.

9 THE CLERK: All rise.

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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.

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6 Shari Riemer

7 Dated: September 17, 2013

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